Supreme Court, U.S.
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No. 95-1289

In The

Supreme Court of the United States

October Term, 1995

RAY H. THARP and ROBERT C. MORCK,

Petitioners,

v.

IOWA DEPARTMENT OF CORRECTIONS AND STATE OF IOWA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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42 U.S.C. § 2000e-2(e)(1) 2

STATEMENT OF THE CASE

The Respondents do not disagree with the Petitioner's Statement of the Case. Additionally, the following facts found by the Eighth Circuit are important to the consideration of this case. At the time of the November 25, 1987 shift changes, the local correctional facility employed 11 male and 6 female Residential Advisors (RAs). Under the prior shift assignment policy, there were times when no female RA was available to conduct same sex searches or urinalysis of female residents in the women's unit. Other, inadequately trained female staff would then perform these functions. To remedy this problem, and to provide positive female role models for the female inmates, the facility adopted the policy that only female RAs would be assigned to the women's unit. There are 4 shifts open only to female RAs and 12 shifts open to both male and female RAs. (Appendix 2-3). *Tharp v. Iowa Department of Corrections*, 68 F.3d 223, 224 (8th Cir. 1995). The Eighth Circuit found that the ineligibility for the women's unit shift assignment was a "minimal restriction" upon the male RAs employment. They did not suffer termination, demotion, or reduction in pay. (Appendix 7-8) *Tharp*, 68 F.3d at 226. Both were eventually promoted.

REASONS FOR DENIAL OF THE PETITION

This Case Presents No Conflict With Decisions Of This Court Or The Courts Of Appeals In Other Circuits.

This case does not conflict with the Court's decision in *International Union, UAW v. Johnson Controls*, 499 U.S.

187 (1991). The Court there found the fetal protection policy in question to be gender-based discrimination which could only be justified if the respondent could establish that sex was a bonafide occupational qualification.[1] 42 U.S.C. § 2000e-2(e)(1). 499 U.S. at 200.

By contrast the Eighth Circuit did not find the challenged policy to be gender-based discrimination prohibited by the act. The facility simply arranged job scheduling in order to ensure a female was always present to facilitate intrusive urinalysis collection, pat searches, and strip searches which involved more than an occasional or inadvertent viewing of an unclothed female by an RA. It resulted in shifts on the women's unit being open only to women, though men also filled those shifts on a relief and vacation basis. The circuit court reached this result after balancing female inmate privacy concerns, *see Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993); *Sepulveda v. Ramirez*, 967 F.2d 1413 (9th Cir. 1992) against the employment rights of correctional officers.

The Eighth Circuit in this case did the same balancing that every other circuit has done when faced with privacy interests of inmates and competing employment interests of correctional staff. *Cookish v. Powell*, 945 F.2d 441 (1st Cir. 1991) (*per curiam;*) *Covino v. Patrissi*, 967 F.2d 73, 78-79 (2nd Cir. 1992); *Forts v. Ward*, 621 F.2d 1210 (2nd Cir.

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[1] Contrary to the Petitioners' claim, the Corrections Department did not seek to establish a BFOQ, except as an alternative position, though the facts would support it. *See Torres v. Wisconsin Department of Health and Social Services*, 859 F.2d 1523 (7th Cir. 1988); *Jennings v. New York State Office of Mental Health*, 977 F.2d 731 (2nd Cir. 1992) (*per curiam*).

1980); *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981); *Kent v. Johnson*, 821 F.2d 1220 (6th Cir. 1987); *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995); *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994); *Smith v. Fairman*, 678 F.2d 52 (7th Cir. 1982) (*per curiam*); *Timm v. Gunter*, 917 F.2d 1093 (8th Cir. 1990), *cert. denied*, 501 U.S. 1209, 111 S.Ct. 2807, 115 L.Ed.2d 979 (1991); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079 (8th Cir. 1980), *cert. denied*, 446 U.S. 966, 100 S.Ct. 2942, 64 L.Ed.2d 825 (1980); *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993); *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988); *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985); *Cumbey v. Meachum*, 684 F.2d 712 (10th Cir. 1982) (*per curiam*); *Hardin v. Stynchcomb*, 691 F.2d 1364 (11th Cir. 1982).

After balancing those interests, the Eighth Circuit found the impact on the two male RAs in this case to be a "minimal restriction[2] on plaintiff's employment". *Tharp*, 68 F.3d at 226. They did not suffer termination, demotion, or reduction in pay; their promotion opportunities were unaffected; and at the same time female inmates' privacy and rehabilitation interests were furthered by reassigning RAs in a manner even less restrictive than that upheld in *Timm v. Gunter*, 917 F.2d 1093 (8th Cir. 1990), *cert. denied*,

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[2] The loss claimed by the Plaintiffs is mere convenience. The shifts on the women's unit begin and end at times different from Petitioner's then current assignment. If the Petitioners had been given the shifts of choice on the women's unit, one would have been able to leave work in time to work at a desired second job and the other would have been able to better coordinate with his wife's work schedule and avoid child care expense. (Tr. Oral Argument in Court of Appeals).

501 U.S. 1209, 111 S.Ct. 2807, 115 L.Ed.2d 979 (1991). *Tharp*, 68 F.3d at 226. (Appendix 7-8).

Use of the balancing test does not contravene this Court's decision in *Johnson Controls*. This case follows, rather than conflicts with cases in other circuits which deal with employment opportunities and inmate privacy.

CONCLUSION

Because there is no conflict with decisions of this Court or the analysis used by other courts of appeals, the Petition should be denied.

Respectfully submitted,

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